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If Its Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014

Ann M. Eisenberg

Amelia Courtney Hritz

Caisa Elizabeth Royer

John H. Blume

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IF IT WALKS LIKE SYSTEMATIC EXCLUSION AND QUACKS LIKE SYSTEMATIC EXCLUSION: FOLLOW-UP ON REMOVAL OF WOMEN AND AFRICAN-AMERICANS IN JURY SELECTION IN SOUTH CAROLINA CAPITAL CASES, 1997-2014

Ann M. Eisenberg,^{*} Amelia Courtney Hritz,^{**} Caisa Elizabeth Royer^{***} &
John H. Blume^{****}

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I. INTRODUCTION

This Article builds on an earlier study analyzing bases and rates of removal of women and African-American jurors in a set of South Carolina capital cases decided between 1997 and 2012.¹ We examine and assess additional data from new perspectives in order to establish a more robust, statistically strengthened response to the original research question: whether, and if so, why, prospective women and African-American jurors were disproportionately removed in different stages of jury selection in a set of South Carolina capital cases.

^{*} Assistant Professor of Law, University of South Carolina School of Law. The authors would like to thank Josh Giancola and Shane Alverson for their thorough research assistance.

^{**} J.D./Ph.D. Candidate in Law and Developmental Psychology, Cornell University.

^{***} J.D./Ph.D. Candidate in Law, Psychology, and Human Development, Cornell University.

^{****} Samuel F. Leibowitz Professor of Trial Techniques, Cornell Law School, and Director, Cornell Death Penalty Project.

1. Ann Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, NORTHEASTERN U. L.J. (forthcoming 2017).

The Supreme Court's 2016 decision in *Foster v. Chatman*² brought *Batson v. Kentucky*³ and its progeny back onto the national stage. In the 1986 *Batson* decision, the Court held that the Equal Protection Clause prohibits prosecutors from using their (discretionary) peremptory challenges in a racially discriminatory manner.⁴ The Court subsequently extended the ban to gender and also concluded that defense counsel, too, were prohibited from excluding jurors on the basis of race or sex.⁵ In last term's decision in *Foster*, issued 30 years after capital defendant Timothy Foster's trial, the Court reaffirmed *Batson*'s core holding and held that the evidence—which included prosecutors' notes revealing a keen focus on jurors' race and the attorneys' views that black jurors would be acceptable if they “had to” take one—was sufficient to make out an Equal Protection Clause violation.⁶

While *Foster* did strike a (small) blow against the widespread prosecutorial practice of removing jurors of color from capital juries, it was bittersweet. The defendant's 30-year wait for the decision is telling: discriminatory jury selection practices are deeply entrenched and the High Court's decisions have done precious little to bring about systemic change.⁷ Yet, the stakes of jury selection in capital cases are literally matters of life and death. Capital juries' representativeness affects outcomes, including individual defendants' likelihood of being found guilty or sentenced to death.⁸ In its 1987 decision in *McCleskey v. Kemp*, the Court overlooked these systemic defects to hold that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system.”⁹ Although most legal

2. 136 S. Ct. 1737 (2016).

3. 476 U.S. 79 (1986).

4. *Id.* at 89.

5. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (“We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.”); *Georgia v. McCollum*, 505 U.S. 42, 55 (1992) (“[A] defendant's discriminatory exercise of a peremptory challenge is a violation of equal protection. . .”).

6. *Foster*, 136 S. Ct. at 1743.

7. See Patrick C. Brayer, *Foster v. Chatman and the Failings of Batson*, 102 IOWA L. REV. ONLINE 53, 53–54 (2016) (“In reflecting on the recent Supreme Court opinion in *Foster v. Chatman*, I was struck by how the Court announced the correct ruling, but failed to capture and comprehend the true reality that racially motivated peremptory strikes still exist and flourish in our nation's judicial system . . . [t]hirty years of *Batson*-influenced jurisprudence has been ineffective in changing the reality that black citizens are barred from juries based on the color of their skin and black litigants, especially criminal defendants, are deprived of true due process and equal protection.”).

8. See Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 282 (2001) (“Because capital sentencing is so discretionary, considerable room exists for a juror's personal characteristics to influence her judgment, at least compared to most jury decisions.”).

9. *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987).

commentators and even some of the Justices in the *McCleskey* majority acknowledge that the case was wrongly decided,¹⁰ the *Foster* judgment suggests the Court continues to decline to make more aggressive, necessary changes to eradicate the pernicious effects of race in the capital punishment system specifically and the criminal justice system generally.

This study of South Carolina jury selection practices in capital cases, as does the article it builds on, adds to decades of empirical research exploring the impacts (or lack thereof) of *Batson* and related jurisprudence on jury selection practices. Part II briefly surveys literature and case law on the interactions of race and gender with jury selection and outcomes in capital cases. Part III describes this study's methodology. Part IV provides the results of the analysis. Part V concludes with discussion of the results' implications for capital jury selection and South Carolina law.

II. BACKGROUND

The Supreme Court's 1972 decision in *Furman v. Georgia* held that all then-existing death penalty schemes violated the Eighth Amendment's Cruel and Unusual Punishment Clause.¹¹ While *Furman*'s mandate was far from clear—five separate opinions made up the majority—there did seem to be a consensus that juries' unfettered discretion resulted in constitutionally intolerable arbitrariness in the imposition of the death penalty.¹² The concurrences of Justices Stewart and Douglas remarked specifically upon the higher death sentencing rates of African-American defendants.¹³ The Court ushered in the “modern” era of death schemes four years later, finding that some of the post-*Furman* capital sentencing regimes fixed, or at least

10. See, e.g., John H. Blume & Sheri L. Johnson, *Unholy Parallels Between McCleskey v. Kemp and Plessy v. Ferguson: Why McCleskey (Still) Matters*, 10 OHIO ST. J. OF CRIM. L. 37, 60 (2012) (“[I]n the long run, we think the moral truth is the surest predictor that *McCleskey*, like *Plessy*, will be consigned to the less-than-glorious past.”); Scott E. Sundby, *The Loss of Constitutional Faith: McCleskey v. Kemp and the Dark Side of Procedure*, 10 OHIO ST. J. OF CRIM. L. 5, 5 (2012) (“Especially in the criminal law area, a legal scholar can invoke *McCleskey* confident that the reader will understand that the case is being used as shorthand for ‘cases in which the Supreme Court failed the Constitution’s most basic values.’”).

11. 408 U.S. 238 (1972).

12. James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1, 8 (2007); Chaka M. Patterson, *Race and the Death Penalty: The Tension Between Individualized Justice and Racially Neutral Standards*, 2 TEX. WESLEYAN L. REV. 45, 46 (1995).

13. Liebman, *supra* note 12, at 8.

appeared to fix, the death penalty's arbitrariness problem.¹⁴ However, the current pattern of capital punishment distribution "is virtually identical to the pattern *Furman* ruled unconstitutional."¹⁵

Many commentators agree that it is simply not possible to tweak capital trial procedures enough to make death sentencing non-arbitrary.¹⁶ Both before and after *Furman*, a proliferation of studies on interactions among criminal defendants, capital juries, and sentencing patterns has shown that race plays a substantial role in capital trials.¹⁷ Pre-*Furman*, defendants' race was a factor in whether they were sentenced to death.¹⁸ Post-*Furman*, the victim's race became the stronger influence.¹⁹ Jurors' characteristics have also been consistently shown to matter. Jurors' race influences how they weigh different considerations, their likelihood of empathizing with a

14. John H. Blume & Lindsey S. Vann, *Forty Years of Death: The Past, Present and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 DUKE J. OF CON. LAW AND PUB. POL'Y 183, 188 (2016).

15. Liebman, *supra* note 12, at 12. See also J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1113 (2014) ("Even a cursory review of state court decisions demonstrates that the incidence of death sentences imposed on black defendants by all-white juries has been widespread over the course of post-*Furman* use of the death penalty.").

16. See Sheri Lynn Johnson et al., *When Empathy Bites Back: Cautionary Tales from Neuroscience for Capital Sentencing*, 85 FORDHAM L. REV. 573, 598 (2016) ("[T]he decision to sentence another human being to death is inevitably an arbitrary one, and one that cannot be divorced from either race or caprice."); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative.").

17. Johnson, *supra* note 16, at 592 (citing U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), at 5–6); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1713–15 (1998); Matt Ford, *A Tainted Execution in Georgia*, ATLANTIC, Apr. 12, 2016.

18. Liebman, *supra* note 12, at 13.

19. *Id.* See also Johnson, *supra* note 16, at 577 ("[E]mpathy for one person can cause individuals to act with aggression toward others," meaning that "juror empathy for victims can . . . be harmful to capital defendants").

defendant, their propensity to find a defendant guilty, and their likelihood of choosing life or death sentences.²⁰

Thus, jury representativeness plays a significant role in the outcomes of capital cases. In turn, different stages of the jury empanelment process affect jury representativeness in different ways. While *Batson v. Kentucky* and its progeny sought to limit the use of peremptory strikes on constitutionally impermissible bases, their impact has been of limited consequence.²¹ *Foster v. Chatman* could have served as an opportunity to expand or refine the doctrine, but more likely, the Court has set a standard for establishing intentional discrimination that will almost certainly prove to be impossible to meet except under the most egregious circumstances, like those presented in *Foster*.²²

The venire and voir dire stages of jury selection also affect jury representativeness. At the venire stage, although defendants have a right to a jury “selected at random from a fair cross section of the community,”²³ sources such as voter lists, from which venires may be drawn, tend to underrepresent the poor and racial and ethnic minorities.²⁴ At the voir dire stage, the process of “qualifying” a capital jury—i.e., removing potential jurors who do not have a “neutral” stance on death sentencing—also has the effect of disproportionately removing women, African-Americans, and other groups from the jury pool.²⁵ Although the Court has long held under the

20. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 351–53 (2000); Johnson, *supra* note 16, at 575–77 (“[E]mpathy lies at the core of the capital trial,” and it is more of a challenge for jurors to cross the “empathic divide” and relate to defendants who do not “feel familiar”); cf. J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1120 (2014) (noting the ineffectiveness of self-reporting of racial biases to reveal juror attitudes during voir dire).

21. Patrick C. Brayer, *Foster v. Chatman and the Failings of Batson*, 102 IOWA L. REV. ONLINE 53, 54–55 (2016).

22. A long-time public defender observed that *Foster* could have done more for protecting criminal defendants’ rights to due process and equal protection by validating a Washington Supreme Court decision in which the court called for replacing *Batson*’s “purposeful discrimination” test with a test that “necessarily accounts for and alerts trial courts to the problem of unconscious bias,” such as if there were “a reasonable probability that race was a factor in the exercise of the peremptory strike,” or the but-for cause for use of the strike. *Id.* (discussing *State v. Saintcaille*, 309 P.3d 326, 339 (Wash. 2013)).

23. 28 U.S.C. 1861 (1968).

24. Edward S. Adams & Christian J. Lane, *Constructing a Jury that Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 705 (1998); Michael S. Zuklie, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 104 (1996) (discussing federal juries).

25. J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1134 (2014).

Equal Protection Clause that cognizable groups may not be systematically excluded from jury service,²⁶ it has also held that disparate impacts based on attitudes do not constitute systematic exclusion.²⁷

This study focuses on South Carolina, where prior empirical work has observed significant, multi-faceted race effects in the administration of the death penalty. In 1983, Paternoster investigated South Carolina prosecutors' charging decisions in 1,800 homicides from 1977 to 1981 and found "glaring disparities in the likelihood of a death request" depending on geography and the race of the victim, with black offender/white victim cases in rural areas showing an eleven times greater likelihood of a death request than a black offender/black victim case in an urban area, although the victim's race was the most important predictor.²⁸ Songer and Unah, investigating similar questions using South Carolina homicide data from 1993 to 1997, found similar urban/rural disparities, an eight-times-higher likelihood of having death sought in the most death-prone district compared to the least death-prone district, and legally impermissible factors such as victim and defendant characteristics influencing capital case selection; they concluded that despite *Gregg*, "arbitrariness and discrimination are still present in South Carolina's capital punishment system."²⁹

Blume and co-authors similarly found from 1977 to 2002 in South Carolina "wide disparity from county to county and judicial circuit to judicial circuit in the frequency in which prosecutors seek the death penalty and in which the death penalty is imposed," as well as effects of defendant

26. *Rose v. Mitchell*, 443 U.S. 545, 559 (1979) ("[D]iscrimination in the selection of the grand jury remains a valid ground for setting aside a criminal conviction."); *Norris v. State of Alabama*, 294 U.S. 587, 589 (1935) ("Whenever by any action of a state . . . all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States.").

27. *Buchanan v. Kentucky*, 483 U.S. 402, 415 (1987) (holding that excluding veniremen based on their conscientious objections to the death penalty does not violate fair cross section Sixth Amendment jurisprudence because those veniremen do not constitute a distinctive group); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.").

28. Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 762, 783 (1983). The study controlled for the type of homicide committed and other possible aggravating factors. *Id.* at 784.

29. Michael Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 205 (2006).

and victim race.³⁰ Expanding the inquiry to 40 years of post-*Gregg* cases, Blume and Vann concluded that South Carolina's death penalty scheme is plagued by errors and unreliability, continues to reveal disproportionate sentences for white-victim cases (81%), and remains highly variable depending on the district of the case.³¹

Notably, one South Carolina prosecutor, Donald Myers of Lexington County, has received both scholarly and public attention for his zeal for the death penalty and his overt racial prejudice, contributing to the variability of death sentences in the state.³² From 1997 to 2016, Myers obtained a total of thirty-nine death sentences and sought the death penalty in white-victim cases at dramatically higher rates than black-victim cases despite African-Americans' higher likelihood of being murder victims.³³ One of the final death sentences in Myers' career was overturned because he compared the black, male defendant to King Kong.³⁴ Attorneys practicing in Lexington County and researchers established anecdotal and statistical data indicating that the prosecutor used peremptory strikes to exclude black jurors in criminal trials.³⁵ The consistent theme throughout these decades of observation is that South Carolina's death penalty scheme remains both discriminatory and arbitrary.

This Article and its predecessor were motivated by Catherine Grosso's and Barbara O'Brien's study on race as a factor in the use of peremptory strikes in 173 post-*Batson* North Carolina capital cases,³⁶ as no comparable studies have been pursued in South Carolina. In that study, Grosso and O'Brien investigated jury selection in the trials of all defendants on the state's death row as of July 1, 2010, in order to assess whether venire

30. John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, CORNELL LAW FACULTY PUBL'N, Paper 243 (2002), at 305. See also John H. Blume et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393 (2014).

31. Blume, *supra* note 14, at 183–254.

32. *Id.*; Blume et al., *Post-McCleskey Claims of Race Discrimination in Capital Cases*, 83 CORNELL L. REV. 1771 (1998); Andrew Cohen, *A Judge Overturned a Death Sentence Because the Prosecutor Compared a Black Defendant to King Kong*, MARSHALL PROJECT (March 28, 2016), <https://www.themarshallproject.org/2016/03/28/a-judge-overturned-a-death-sentence-because-the-prosecutor-compared-a-black-defendant-to-king-kong#.7f5t12hJT>.

33. Blume, *supra* note 14, at 207.

34. Cohen, *supra* note 32.

35. Blume, *supra* note 32, at 1792.

36. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012).

members' race had been a factor in prosecutors' use of peremptory challenges.³⁷ After examining 7,421 venire members, they concluded that "[p]rosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against all other venire members," striking 52.6% of eligible black venire members and 25.7% of others.³⁸ The disparity was greater in cases with black defendants.³⁹ When the authors controlled for possible race-neutral reasons for removals, the disparities persisted.⁴⁰

This Article's predecessor (Part I of this study), although narrower in scope than O'Brien and Grosso's study, reached comparable conclusions. Key findings for observations of 3,031 venire members for gender and 1,088 venire members for race (with limited available data on jurors' race accounting for the disparity) in South Carolina capital cases tried from 1997 to 2012 included: (1) African-Americans were removed disproportionately at the voir dire stage because of opposition to the death penalty (32% of black venire members, compared to 8% of white venire members), as were women at a lower rate; (2) the prosecution struck black potential jurors at a disproportionately high rate (35% of black strike-eligible venire members, or 15% of all black venire members, compared with striking 12% of white strike-eligible venire members, or 8% of all white venire members); (3) the prosecution was more likely to exercise peremptory strikes on women and the defense was more likely to strike men; and (4) the combined effects of removal for views against the death penalty and the use of prosecutorial strikes functioned as a substantial impediment to African-Americans serving on the jury (accounting for removing 47% of black venire members in the study, compared with 16% of white venire members), with black jurors ultimately underrepresented on juries.⁴¹ The discussion below explains how this Article (Part II of the study) expands upon these findings.

III. METHODOLOGY

For Part II of this study, we again examine the strike rates of state and defense counsel in South Carolina capital cases. In addition, we examine whether the rates differ based on race and gender of the venire member or based on the defendant's race. Next, we explore how the use of peremptory

37. *Id.* at 1533.

38. *Id.* at 1548.

39. *Id.* at 1549. In these cases, "the average strike rate was 60% against black venire members and 23.1% against other venire members." *Id.*

40. *Id.* at 1551.

41. Eisenberg, *supra* note 1.

challenges by the state and defense counsel influence the likelihood that the jury will be representative of the county in terms of race and gender. We test whether a disparity may be better explained by venire members being excused for cause.

Transcripts of voir dire questioning were used to collect data from thirty-five different capital cases in South Carolina from the period of 1997 to 2014, including observations for 3,159 venire members.⁴² Trial transcripts were acquired from the Office of Appellate Defense, a division of the South Carolina Office of Indigent Defense. Additional materials, such as juror questionnaires, were retrieved from attorneys who had worked on the cases. From these materials, research assistants collected available information about potential jurors, including their race, gender, ultimate status on the jury (seated, became an alternate juror, excused for cause, dismissed via a peremptory strike, or qualified but not reached for strikes), and the reason the juror was excused, if applicable.

If unavailable in the record, research assistants were often able to figure out the gender of potential jurors from their names or the judges' or attorneys' use of the terms "sir," "ma'am," "Mr.," or "Ms." The race of potential jurors was collected only when explicitly stated in the transcript, which meant that less information was collected for race than for gender, though some information on race was available through review of juror questionnaires. There were thirty-five cases with available information on potential jurors' gender (with observations of 3,159 venire members, 128 more than in Part I), and twenty-nine cases⁴³ with available information on potential jurors' race (with observations of 1,872 venire members, 784 more than in Part I). As data collection has been ongoing, this analysis includes more cases with complete information than Part I did; some cases with incomplete information that were included in the Part I analysis were

42. Bayan Aleksey (1998); Jonathan Kyle Binney (2003); Steven Vernon Bixby (2007); Ricky Lee Blackwell (2014); James Nathaniel Bryant (2004); Luzenski Allen Cottrell (2005; 2014); Kamell D. Evans (2004); Fredrick Evins (2004); Ron Oneal Finklea (2007); Jeffrey Haselden (2001); David Mark Hill (2000); William Kelley (1998); Michael Laney (2001); Marion Lindsey (2004); Jimmy Locklair (1996); Kevin Mercer (2006); Eric Dale Morgan (2004); Jeffrey Motts (2007); Freddie Owens (2006); Jesse Waylon Sapp (2003); Brad Keith Sigmon (2002); Stephen Stanko (2006; 2009); Norman Starnes (1997; 2007); Bobby Wayne Stone (1997; 2005); Christopher Dale Tench (2000); Angel Joe Pierre Vasquez (2003); John Edward Weik (1999); Charles Williams (2005); Louis Michael Winkler (2008); Arthur Hastings (2001); Anthony Woods (2006).

43. Race data was not available for Luzenski Allen Cottrell (trial 1); Marion Lindsey; Eric Dale Morgan; Jeffrey Motts; Freddie Owens; and John Edward Weik.

excluded here.⁴⁴ Thus, in addition to adding to the data used in Part I, the data included here have fewer gaps.

In addition, researchers coded the reason why potential jurors were dismissed for cause into eleven different categories: automatic death disposition, refusal to enforce death, bias,⁴⁵ illiteracy or incomprehension of court instructions, knew someone involved in case, medical issues, perjury or contempt of court,⁴⁶ prior conviction, work or personal timing conflict, personal reasons,⁴⁷ and reason unknown.

There are several limitations to this study. First, we have tried (diligently) to gather data from as many capital cases as possible, but the collection of data is still ongoing. Therefore, the dataset is currently not a random or exhaustive sample of South Carolina capital punishment cases, but rather the data readily available to the researchers. Cases were included in this study if we had substantially complete data for the venire, including knowing the ultimate status of the prospective jurors. Another limitation to this study is that the cases examined are only cases that resulted in death. Future research should compare jury selection in cases that did not result in death to control for possible juror characteristics or pre-trial procedures that may increase the likelihood of a death sentence. We were also unable to control for race- and gender-neutral factors accounting for juror strikes.

IV. RESULTS

Question 1 - What are the strike rates of the state and defense counsel? Do the rates differ based on race and gender of the venire member? Of the defendant and victim?

We estimated “strike rates” to measure state and defense decisions to strike or accept potential jurors.⁴⁸ We estimated the number of strike-eligible jurors by adding the number of jurors who ultimately served, served as alternates, were struck, and were qualified and not reached at the strike

44. Some cases with incomplete data were included in some parts of this analysis and not others. When cases are excluded, we indicate it in the Results section.

45. For example, if the potential juror was familiar with the case, had listened to media coverage about the case, or had previously been the victim of a similar crime.

46. This category was also used if the potential juror disagreed with the rule of law. For example, one juror believed that defendants should have to prove their own innocence.

47. This category was used as a catch-all for otherwise uncategorized reasons, such as being over the age of 65 or being an employee of the courthouse. For some cases coded early in the process, research assistants coded all explanations other than “refusal to enforce death” and “automatic death disposition” as personal.

48. See David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 48 (2001).

stage. In our calculation of eligible jurors for defense strikes we did not include the jurors struck by the state, because they are removed from the pool before the defense exercises their strikes. We used strike rates to examine whether state and defense counsel use peremptory strikes at different rates depending on the race and gender of venire members. The defense is allotted 10 peremptory strikes for primary jurors and 2 strikes for each alternate juror called. The state is allotted 5 peremptory strikes for primary jurors and 1 for each alternate juror.⁴⁹ Table 1 presents the average state and defense strike rates.⁵⁰ As expected, the defense strike rate is higher, with the defense striking approximately six more venire members per case than the state. The defense strikes approximately 11.24 venire members per case. The state strikes approximately 5.55 venire members per case.

TABLE 1. AVERAGE DEFENSE AND STATE STRIKES PER CASE.⁵¹

	State	Defense
Strikes	5.55	11.24
Strike-eligible venire members	39.24	33.7
Strike rate	14%	34%

Next, we examined whether defense and state strike rates differed based on the race and gender of the venire member.⁵² Twenty-eight cases in our dataset included substantially complete information on the venire members' race, gender, and status on the jury.⁵³ As shown in Table 2, the state struck black males at the highest rate (33%) and white males at the lowest rate (10%). The defense struck white males at the highest rate (42%) and black males at the lowest rate (8%). A two-way analysis of variance tested the

49. S.C. CODE ANN. § 14-7-1110 ("Any person who is arraigned for the crime of murder . . . is entitled to peremptory challenges not exceeding ten, and the State in these cases is entitled to peremptory challenges not exceeding five."); S.C. CODE ANN. § 14-7-1120 ("In criminal cases the prosecution is entitled to one and the defendant to two peremptory challenges for each alternate juror called. . . .").

50. No peremptory strike data was available for Jesse Waylon Sapp, so the data from this case was excluded from the peremptory strike analyses.

51. This analysis includes 34 cases in our dataset that have peremptory strike information. *See* Appendix A.

52. Because of the scarcity of potential jurors of races other than black or white (six Asian, five Hispanic, two Native American, and one multiracial), those jurors will not be included in this analysis or any of the following analyses assessing race.

53. We are missing venire members' race in the following cases: Luzenski Cottrell (trial 1), Marion Lindsey, Eric Morgan, Jeffrey Motts, Freddie Owens, and John Weik.

influence of decision-maker (state and defense) and race and gender of venire member (black female, black male, white female, and white male) on the likelihood of being struck from the jury. The venire member's race and gender revealed significant differences, $F(3) = 3.00$, $p < 0.05$. In addition, the interaction of decision-maker and venire member race and gender was highly significant, suggesting that state and defense counsel strike venire members by race and gender at very different rates, $F(3) = 27.09$, $p < 0.0001$.

TABLE 2. AVERAGE STRIKES PER CASE BASED ON RACE AND GENDER OF VENIRE MEMBER.

Decision Maker		Black Female	Black Male	White Female	White Male
State	Strike rate	25%	33%	15%	10%
	Strike eligible	3.46	2.89	14.71	14.82
Defense	Strike rate	8%	6%	34%	42%
	Strike eligible	2.46	1.96	12.43	13.29

Finally, we tested whether state and defense strike rates differ based on the race of the defendant. Of the 28 cases with substantial race, gender, and peremptory strike information, 11 cases have black male defendants and 17 cases have white male defendants.⁵⁴ As shown in Table 3, defense counsel was less likely to strike black venire members in cases with a black defendant. The defense struck 1% of black women and 0% of black men in cases with a black defendant, and 12% of black women and 10% of black men in cases with a white defendant. Independent-samples t-tests revealed that the defense strike rate of black females was significantly different in white and black defendant cases $t(26)=1.76$, $p<.05$. Other comparisons were not significant, which is likely due to the reduced sample size.

54. South Carolina has only sentenced one woman to death and her case was not included in our analysis. See DEATH PENALTY INFORMATION CENTER, WOMEN AND THE DEATH PENALTY, <http://www.deathpenaltyinfo.org/women-and-death-penalty#State%20Breakdown> (last visited Jan. 19, 2017).

TABLE 3. AVERAGE STRIKES PER CASE BASED ON RACE AND GENDER OF VENIRE MEMBER SEPARATED BY RACE OF THE DEFENDANT.

Black Defendant					
		Black Female	Black Male	White Female	White Male
State	Strike rate	31%	29%	13%	7%
	Strike eligible	3.64	2.45	15.18	13.27
Defense	Strike rate	1%	0%	32%	45%
	Strike eligible	2.27	1.73	13.09	12.27
White Defendant					
		Black Female	Black Male	White Female	White Male
State	Strike rate	21%	36%	17%	13%
	Strike eligible	3.35	3.18	14.41	15.82
Defense	Strike rate	12%	10%	36%	41%
	Strike eligible	2.59	2.12	12.00	13.94

Question 2 - How does the use of for-cause challenges influence the likelihood that the jury will be representative of the county in terms of race and gender?

An analysis was conducted to compare the racial and gender compositions of juries in our dataset to the demographics of the counties in which the cases took place. For this analysis, the gender and racial composition of both the seated jury and the alternates were used. Thirty-five different cases were used to examine gender and twenty-nine cases were used to examine race. Results of this analysis are shown in Table 4. Because sample size for each county was low,⁵⁵ statistical testing was not done to compare average composition of each jury to the actual county demographics. However, the trends tend to show that black jurors are underrepresented on capital juries, compared to the actual percentage of black people living in the county.

To better test representativeness, an analysis was completed to compare the average racial and gender compositions of juries across all of the cases in the database compared to the actual demographics of South Carolina as a

55. Most counties only hosted one or two cases, with the exception of Greenville (six), Horry (five), Lexington (six), Spartanburg (six), and Sumter (three).

whole (rather than county by county). One limitation of this analysis is that South Carolina demographic information was used from the most recent census in 2015, while some of these cases occurred much earlier when demographics could have been slightly different.⁵⁶ In 2015, South Carolina was 51.40% female, compared to the average jury in our dataset, which was 49.02% female. An independent samples t-test was conducted to compare the percent of women on each jury to the percent of women in South Carolina, and a significant difference was found, $t(68)=119.11, p<.01$. There are more women in South Carolina than are represented, on average, on a capital jury. South Carolina was 27.90% black, while the average jury in our dataset is 18.80% black. An independent-samples t-test was conducted to compare the percent of black people on each jury to the percent of black people in South Carolina, and a significant difference was found; $t(55)=240.43, p<.01$. There are more black people in South Carolina than are represented, on average, on a capital jury.

TABLE 4. RACIAL AND GENDER COMPOSITION OF JURIES BY COUNTY

	AVERAGE ACROSS CASES:			ACTUAL COUNTY DEMOGRAPHICS (2015) ⁵⁷	
	Percent Black:	Percent Female:		Percent Black:	Percent Female:
Abbeville:	31.25%	62.50%		28.30%	51.30%
Aiken:	23.33%	60.00%		24.60%	51.50%
Anderson	6.67%	60.00%		16.50%	51.80%
Berkeley	30.77%	30.77%		25.00%	50.10%
Cherokee	6.67%	53.33%		20.80%	51.40%
Clarendon	37.50%	62.50%		48.30%	50.80%
Dorchester		35.71%		25.90%	51.30%
Georgetown	46.67%	26.67%		32.10%	52.50%
Greenville	11.67%	47.69%		18.50%	51.40%
Horry	20.36%	57.94%		13.60%	51.60%
Lexington	5.87%	41.51%		15.30%	51.20%
Orangeburg	50.00%	50.00%		62.10%	53.30%

56. The earliest cases occurred in 1997.
57. UNITED STATES CENSUS BUREAU QUICKFACTS, <https://www.census.gov/quickfacts/> (last visited Jan. 19, 2017).

	AVERAGE ACROSS CASES:			ACTUAL COUNTY DEMOGRAPHICS (2015) ⁵⁷	
	Percent Black:	Percent Female:		Percent Black:	Percent Female:
Spartanburg	11.95%	37.14%		21.00%	51.50%
Sumter	39.25%	55.87%		47.20%	51.80%
TOTAL:	18.80%	49.02%	SOUTH CAROLINA:	27.90%	51.40%

Because these results suggest that the average capital jury is not representative of South Carolina, either with regard to race or gender, we next examined whether these disparities could be explained due to for cause challenges. If more women than men are dismissed from the jury pool due to negative feelings toward the death penalty, this could explain why there are proportionally fewer women on a capital jury than in South Carolina. The same could also be true for racial disparities.

Independent-samples t-tests were used to compare the reasons potential jurors were excused for cause across race (black, white) and gender (male, female). We were particularly interested in whether a certain demographic was more likely to be excluded for cause due to an automatic death disposition or refusal to enforce the death penalty. A total of 189 potential jurors were excused due to automatic death disposition (14 black, 112 white, 63 unknown or other; 62 female, 127 male). An average of 6.56% of white potential jurors ($SD=0.07$) were excused across cases due to automatic death disposition, compared to 2.30% of black potential jurors ($SD=0.04$). The difference between black and white potential jurors was statistically significant, with white jurors more likely to be excused due to an automatic death disposition; $t(56)=2.70$, $p<.01$. For women, an average of 3.96% of potential jurors were excused due to automatic death disposition across all cases ($SD=0.04$), compared to 7.97% of male potential jurors ($SD=0.08$). The difference between men and women was statistically significant, with men more likely to be excused due to an automatic death disposition; $t(68)=2.73$, $p<.01$. Thus, both men and white potential jurors are more likely to express an automatic death disposition.

A total of 378 potential jurors were excused due to a refusal to enforce the death penalty (120 black, 106 white, 152 unknown or other; 217 female, 161 male). An average of 23.95% of black potential jurors were excused due to a refusal to enforce the death penalty ($SD=0.22$), compared to 6.20% of white potential jurors ($SD=.06$). The difference between black and white potential jurors was statistically significant, with black jurors more likely to be excused due to a refusal to enforce the death penalty; $t(56)=4.11$, $p<.01$. For women, an average of 14.28% of potential jurors were excused due to a

refusal to enforce the death penalty across all cases ($SD=0.09$), compared to 9.94% of male potential jurors ($SD=0.06$). The difference between men and women was statistically significant, with women more likely to be excused due to a refusal to enforce the death penalty; $t(68)=2.30$, $p=.02$. Thus, both women and black potential jurors are more likely to express an unwillingness to enforce the death penalty.

We found one additional significant difference between bases of excusals for cause between black and white potential jurors. White potential jurors were excused due to knowing someone involved in the case ($M=0.81\%$, $SD=0.02$) at a higher rate than black potential jurors ($M=0\%$, $SD=0.0$); $t(56)=2.72$, $p<.01$. The differences between excusals for bias, illiteracy or incompetency, medical issues, perjury or being in contempt of court, personal reasons, prior convictions, and work or personal timing conflicts was not statistically significant across race.

There were other significant differences for why men and women were excused for cause. For females excused due to bias ($M=5.51\%$, $SD=0.08$) compared to males ($M=9.80\%$, $SD=0.09$), a greater percentage of men were excused due to bias, $t(68)=2.04$, $p=.04$. For females excused due to a medical issue ($M=1.45\%$, $SD=0.02$) compared to males ($M=0.50\%$, $SD=0.012$), females were more likely to be excused due to a medical issue; $t(68)=2.04$, $p=.045$. For females excused due to a prior conviction ($M=0.36\%$, $SD=0.001$) compared to males ($M=1.48\%$, $SD=0.003$), males were more likely to be excused due to a prior conviction; $t(68)=2.72$, $p<.01$. The differences between excusals for illiteracy or incompetence, knowing someone involved in the case, perjury or being in contempt of court, personal reasons, and work or personal timing conflicts were not statistically significant across gender.

V. CONCLUSION

Although limited in their generalizability, the findings in this study add to data on persistent problems with jury representativeness in capital cases in South Carolina. First, the findings from Part I of this study persisted with the stronger dataset in Part II and are consistent with many previous studies' findings indicating that capital jury selection procedures serve to systematically siphon off women and African-Americans through the death-qualification process and peremptory strikes. Key findings in Part I included that the prosecution struck 35% of strike-eligible black potential jurors, accounting for removing 15% of black venire members; that approximately 32% of black venire members were removed for opposition to the death penalty; and that the combined effects of these two stages prevented a total

of 47% of black venire members from serving, compared to those stages preventing a combined 16% of the white venire pool from serving.

Those findings have for the most part persisted with the stronger dataset here, with slight variations. The prosecution struck 29% of strike-eligible black potential jurors (the average of a 33% strike rate for black men and 25% for black women), accounting for removing 13% of black venire members; approximately 24% of black venire members were removed for opposition to the death penalty; and the combined effects of these two stages prevented a total of 42% of black venire members from serving. This is compared to the prosecution striking 12.5% of strike-eligible white potential jurors, which equates to about 7% of the overall white venire pool; and 6.2% of white potential jurors being removed for anti-death views, with the two stages preventing, combined, an approximate 13% of white venire members from serving.⁵⁸

Although race- or gender-neutral factors might explain some of these disparities, the consistency of these findings with those of previous studies suggests that prosecutors' use of peremptory strikes was motivated by race, and to a lesser extent, gender, underscoring *Batson*'s inefficacy once again; and that the death-qualification process has disparate impacts according to race and gender. Procedures for jury selection in these capital cases may not nominally involve systematic exclusion of a racial group from jury service. But the overall effect in practice is systematic exclusion and

58. The defense's strike rate variations by race and gender, although notable, are of less interest in this study for several reasons. Primarily, the rationale behind the existence of peremptory challenges in the first place is to afford protections to a criminal defendant. The prosecutor's capacity to discriminate is arguably distinguishable from the defendant's capacity to discriminate because the prosecutor is a state actor potentially depriving a defendant of his or her liberty. See generally Sharon Leigh Nelles, *Extending Batson v. Kentucky to the Criminal Defendant's Use of the Peremptory Challenge: The Demise of the Challenge without Cause*, 33 B.C.L. REV. 1081 (1992). Similarly, a concern motivating empirical inquiry into these matters is the jury's protective function for the defendant. That is, a jury is meant to serve as a check on zealous government actors overriding a defendant's right to a fair trial. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). Yet, unrepresentative juries tend to do just the opposite, instead serving as another vehicle for majority rule. Cf. *id.* at 530 (the jury as "prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool"). Thus, defense counsel's strikes that are potentially based on unconstitutional bases are of less concern because their ultimate effect is not to effectuate unrepresentative juries, due to their tendency to target white men. Finally, defense attorneys may be said to have an ethical obligation to take demographic considerations into account in their efforts to advocate for their clients. As discussed in Part I of this study, "a defense attorney may take race into account for her choices of strikes if she feels that an attempt to comply with *Batson* would force her to ignore, to her client's detriment, her knowledge of the statistical evidence of how jurors' attitudes are influenced by their race." Eisenberg, *supra* note 1.

unrepresentative juries. These findings again highlight the discrimination and arbitrariness that infect South Carolina's capital punishment system, and the longstanding fictions of *Gregg* and *Batson*.

APPENDIX A

TABLE X. STATUS OF VENIRE MEMBERS IN SAMPLE.

Case	Seated and alternates	Excused for cause	Peremptory strike - Defense	Peremptory strike - State	Qualified not reached
Aleksey, Bayan	14	78	8	4	10
Binney, Johnathan Kyle	15	29	16	7	
Bixby, Steven Vernon	17	83	11	3	5
Blackwell, Ricky Lee	12	2	6	12	
Bryant, James Nathaniel	14	45	10	6	12
Cottrell, Luzenski Allen (trial 1)	15	30	13	6	7
Cottrell, Luzenski Allen (trial 2)	16		13	7	
Evans, Kamell D.	15	58	10	5	8
Evins, Fredrick	14	24	12	7	
Finklea, Ron Oneal	15	35	10	5	13
Haselden, Jeffrey	14	18	13	7	3
Hill, David Mark	15	43	12	4	2
Kelley, William	14	10	12	7	5
Laney, Michael	15	58	14	6	4
Lindsey, Marion	15	42	10	5	9
Locklair, Jimmy	15	41	10	6	8
Mercer, Kevin	15	39	14	7	7

Case	Seated and alter- nates	Excused for cause	Peremptory strike - Defense	Peremptory strike - State	Qualified not reached
Morgan, Eric Dale	15	48	14	6	6
Motts, Jeffrey	13	45	8	3	
Owens, Freddie	15	33	8	3	18
Sapp, Jesse Waylon	14	281			
Sigmon, Brad Keith	15	18	12	6	5
Stanko (Georgetown)	15	73	8	4	18
Stanko, Stephen (Horry)	16	63	12	4	13
Starnes, Norman (trial 1)	14	14	6	5	11
Starnes, Normal (trial 2)	15	73	12	6	14
Stone, Bobby (trial 1)	15	35	12	7	6
Stone, Bobby (trial 2)	14	22	10	7	6
Tench, Christopher Dale	15	40	7	6	37
Vasquez, Angel Joe Pierre	14	58	10	4	
Weik, John Edward	14	27	12	5	5
Williams, Charles	15	41	13	5	4
Winkler, Louis Michael	16	65	15	8	6
Wise, Arthur Hastings	15	25	13	5	5
Woods, Anthony	16	70	11	7	4

